(3)

FILED
MAY 26 1941
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 1019.

THE CENTRAL NATIONAL BANK OF CLEVELAND,
Trustee,
Petitioner,

vs.

ROBERT O'BRIEN,
Executor of the Estate of James O. Mills,
Deceased.

REPLY BRIEF OF PETITIONER.

DORR E. WARNER,
1101 Hippodrome Bldg.,
Cleveland, Ohio,
Attorney for Petitioner.

ORLIN F. GOUDY,
Engineers Bldg.,
Cleveland, Ohio,
Counsel.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

INDEX.

Authorities Cited.

Case.

Burbank v. Ernst, 232 U. S. 162..... 2

Statute.

Bankruptcy Act, Section 77-B.....1, 4

Rule.

U. S. Supreme Court Rule 27, par. 3..... 3

In the Supreme Court of the United States

OCTOBER TERM, 1940.

No. 1019.

THE CENTRAL NATIONAL BANK OF CLEVELAND,
Trustee,
Petitioner,

vs.

ROBERT O'BRIEN,
Executor of the Estate of James O. Mills,
Deceased.

REPLY BRIEF OF PETITIONER.

There are two Federal questions of law involved in this action:

1. Did the release and discharge of its claim for rent against the Restaurant Company in the proceeding to reorganize the Building Company under Section 77-B of the Bankruptcy Act release the liability of respondent who had guaranteed payment of said claim?
2. Was the proviso in the decree confirming the plan of reorganization of the Building Company that the release and discharge of said claim should not release the guarantor a nullity?

In his Opinion (R. 216), Judge Leach held that the release and discharge of its claim for rent against the Restaurant Company in the proceeding to reorganize the Building Company under Section 77-B of the Bankruptcy Act, did release the liability of respondent who had guaranteed payment of the claim and

The proviso of the decree confirming the plan of reorganization of the Building Company that the release and discharge of said claim should not release the guarantor was a nullity.

The reviewable character of a decision of the highest State Court and what was drawn in question and decided is ascertained from its judgment and opinion. *Burbank vs. Ernst*, 232 U. S. 162.

Judge Leach decided the issue in this case solely on those two Federal questions and no other (R. 216), and his decision was affirmed by the Court of Appeals. (R. 228.) No question of fact was involved in his decision.

The Respondent has attempted to inject into this case questions of fact that are not in the Record in order that this Court will not hear this case on the merits of the Federal questions of law involved. The statements of fact hereinafter quoted from his brief are not in the Record. In making these statements Respondent has violated the rule of this Court which requires that whenever reference is made to the Record it must be accompanied by the Record page number. (Rule 27, par. 3.) There follows, in quotations, statements of fact that are not in the Record.

It is true that prior to the reorganization proceedings the Trustee (your petitioner) held no stock in The Mills-Cleveland Restaurant Company, and received the stock of the reorganized company as provided by the Plan of Reorganization, but the Record contains no evidence that it received said stock as the result of any demand made by the Trustee, but in his brief (page 3), respondent states that the stock was received "in the settlement it demanded." The fact is there is no evidence in the Record that the Trustee ever demanded any settlement of any kind or description.

The Record contains no evidence that—

> "Next, *the Trustee was not willing to accede to the Plan of Reorganization or to execute the said release unless* James O. Mills would agree to deposit with the

Trustee bonds of The Smythe Building Company of the face value of $23,000 and consent that these bonds be subordinated to all other bonds with respect to the payment of interest and principal. This was done." (Respondent's Brief, page 4.) (Italics ours.)

The Record contains no evidence that—

"This voluntary contribution by James O. Mills must have been and was for the purpose of securing a *complete release* on the part of the Trustee of the claim for back rent due from The Mills-Cleveland Restaurant Company, on which he was guarantor, *and all parties understood that, when this claim was released, Mills, likewise, was relieved of his guaranty.* That is what he wished to accomplish for himself and that is what the Trustee and the bondholders intended he should have." (Respondent's Brief, page 4.) (Italics ours.)

The Record shows that the Trustee received an order from The Smythe Building Company requiring the reorganized Restaurant Company to pay rent under the new lease directly to Central National Bank of Cleveland, Trustee (R. p. 140) but the Record contains no evidence "that the Trustee demanded" said order, and the Record contains no evidence that the Trustee made any other demands of any kind or description.

We respectfully submit that because of his failure to comply with Rule 27, par. 3 of this Court requiring him to state the page of the Record where these references are found, such statements should be disregarded. Possibly a motion to strike the brief from the file because of failure to comply with said rule of this Court would be in order.

It is true that there was a valuable consideration for the acceptance of the terms of the Plan of Reorganization of the Building Company by security holders, and for their consent to the discharge of its liabilities, except as provided by the Plan.

Pursuant to the Court order, the Trustee receipted for the exact security called for by the Plan and executed the exact release called for by the Plan. The release contains

nothing not called for by the Plan. The Plan required the Building Company to accept from the Restaurant Company 1625 shares of its new preferred stock and 500 shares of its new common stock in satisfaction of the rent, and the Building Company in turn was to transfer such stock to your petitioner, which, together with $23,000 par value of bonds, it was to hold as security for the payment of bonds held by the public. (R. 136.)

The Trustee executed its part of the Plan strictly in accordance with the decree and order of the Court—it did exactly what the Court ordered it to do. In its final decree the Court found:

> "That the Debtor has fully consummated and executed its Plan of Reorganization in accordance with the terms thereof and of all orders of Carl D. Friebolin, Special Master, and of this Court." (R. 146.)

We respectfully submit that the sole questions presented for the consideration of this Court are as follows:

1. Did the release and discharge of its claim for rent against the Restaurant Company in the proceeding to reorganize the Building Company under Section 77-B of the Bankruptcy Act release the liability of respondent who had guaranteed payment of said claim?
2. Was the proviso in the decree confirming the plan of reorganization of the Building Company that the release and discharge of said claim should not release the guarantor a nullity?

Respectfully submitted,

DORR E. WARNER,
Attorney for Petitioner.

ORLIN F. GOUDY,
Counsel.